

Dangers of Cyberspeech: Cyber-Bullying, Cyber-Communications, and Sexting.

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If you have a teenager ...



School house lessons.

Schools have been dealing with these issues for years and we have learned some lessons:

- Cyber-bullying;
- Sexting;
- Facebook/MySpace.



That was then.



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This is now.



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What is social networking?

LinkedIn

An online community of people who share interests and/or activities, or who are interested in exploring the interests and activities of others. Most social network services are web-based and provide a variety of ways for users to interact, such as e-mail and instant messaging services.

facebook

twitter



myspace.com
a place for friends

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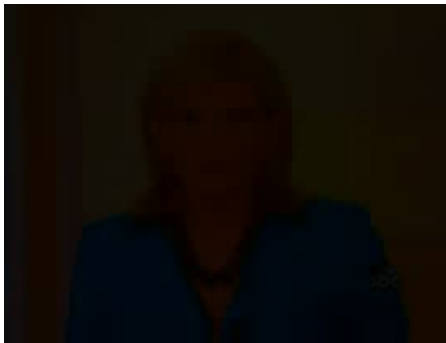
What is social networking?

- Wikipedia lists 142 major active social networking websites. The most popular include:
 - My Space;
 - Facebook;
 - Twitter;
 - LinkedIn;
 - Tagged.com.
- Other sites include:
 - You Tube;
 - Flickr;
 - Blogspot.

Lord of the Flies.



- "And in the middle of them, with filthy body, matted hair, and unwiped nose, Ralph wept for the end of innocence, the darkness of man's heart, and the fall through the air of the true, wise friend called Piggy."*



What is Cyber-Bullying?

Cyber-bullying or online bullying is a term used to refer to bullying over electronic media, usually through instant messaging and e-mail. Other terms for cyber-bullying are electronic bullying, electronic harassment, e-bullying, SMS bullying, mobile bullying, online bullying, digital bullying, or Internet bullying.

Worse than in person?

- Electronic media allows the bully to remain “virtually” anonymous;
- Electronic forums often lack supervision;
- Teenagers often know more about computers and cellular phones than their parents;
- Cellular phones are ubiquitous and make the owner a perpetual target, even at home.

What is the School's Role?

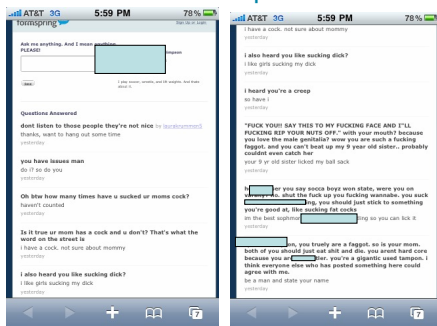
“Schools can be very effective brokers in working with the parents to stop and remedy cyberbullying situations. They can also educate the students on cyberethics and the law.”
http://www.stopcyberbullying.org/prevention/schools_role.html.

Too Far?

"If schools are creative, they can sometimes avoid the claim that their actions exceeded their legal authority for off-campus cyberbullying actions. We recommend that a provision is added to the school's acceptable use policy reserving the right to discipline the student for actions taken off-campus if they are intended to have an effect on a student or they adversely affect the safety and well-being of student while in school. This makes it a contractual, not a constitutional, issue."



Real World Example.



What can Schools do?

Tinker v. Des Moines Independent Comm. Sch. Dist.,
393 U.S. 503 (1969) - Students entitled to 1st
Amendment rights.

Bethel v. Fraser, 478 U.S. 675 (1986) – In school profane speech can be restricted.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) – School sponsored speech (student newspaper) can be restricted.

Morse v. Frederick, 127 S.Ct. 2618 (U.S. 2007) – School can restrict in-school speech that counters school message (drug speech).



Indiana, The Good Old Days.

- I.C. § 20-8.1-5-4 Grounds for Suspension or Expulsion.
- (12) Knowingly possessing or using on school grounds during school hours an electronic paging device or a handheld portable telephone in a situation not related to a school purpose or an educational function ...
- Repealed in 1995.

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New York Solution.

- In response to rampant inappropriate conduct involving cell phones, in 2005 the New York City Board of Education banned all electronic devices from its schools including cell phones, beepers and other communication devices.
- Conduct included:
 - Taking and exhibiting sexually explicit pictures;
 - Cell phones used to cheat on tests;
 - Cell phones used to call allies to participate in fights or threaten, intimidate and bully other students.
- Text messaging exacerbated these problems.



New York Gets Sued.

- A group of parents then sued alleging that "cell phones are a vital communication tool and security device that New York City public school students and their families rely upon during students' commute to and from schools and after-school activities."
- They also asserted that the cell phone ban prevented them from communicating with their children, thus depriving them of their liberty interest in raising their children.



New York Gets Sued.

- Price v. New York City Board of Educ., 855 N.Y.S.2d 530 (A.D. 1 Dept. 2008).
- The court first addressed the issue of whether the school's outright ban was reasonable under the circumstances:
- "[I]t cannot be denied that the use of cell phones for cheating, sexual harassment, prank calls and intimidation threatens order in the schools ... As the Department has demonstrated, a ban on possession of cell phones is necessary because a ban on use is not easily enforced."



New York.

- The Constitutional challenge also failed:
"The cell phone ban does not directly and substantially interfere with any of the rights alleged by the Parents. Nothing about the cell phone policy forbids or prevents parents and their children from communicating with each other before and after school.
- Applying a "rational basis" test, the Court approved the School's policy.



Indiana, Current Law.

- I.C. § 20-33-8-12 Adoption of discipline rules.
 - (a) The governing body of a school corporation must do the following: (1) Establish written discipline rules, which may include: (A) appropriate dress codes; and (B) if applicable, an agreement for court assisted resolution of school suspension and expulsion cases; for the school corporation.



School by School Rules.

- Evansville's Policy 5136: "Student **possession** of telephone paging devices (e.g., beepers or pagers) is prohibited on school grounds, at school sponsored events, and on school buses or other vehicles provided by the Corporation. Students may not use cellular telephones, including camera phones, or other electronic communication devices (ECDs) (e.g., personal digital assistants (PDAs) and other devices designed to receive and send an electronic signal) during the school day. Cellular telephones and ECDs must be kept out of sight and turned off (not just placed in vibrate or silent mode) during the school day."



Evansville Policy.

- "In addition, students are not permitted to use cellular telephones, including camera phones, or ECDs to record/store/send/transmit the spoken work or visual image of any person, including other students or staff members, or educational instrument/document (e.g., test, quiz, etc.) any time while on school property or at a school-sponsored event. Finally, students may not use cellular telephones or ECDs on school property or at a school-sponsored activity to access and/or view Internet web sites that are otherwise blocked to students at school."



Discipline for Cell Phone Use.

- Laney v. Wilson County Board of Educ., 501 F.3d 577 (6th Cir. 2007).
- 8th grader's cell phone went off in class. Teacher seized the phone and the student received a one-day suspension.
- Parents sued "seeking \$ 500,000 in compensatory damages and \$ 300,000 in punitive damages, alleging violations of due process rights under 42 U.S.C. § 1983 related to the thirty-day retention of the phone and the imposition of the in-school suspension."
- Court noted the deprivation was "trivial" and dismissed the case.



You Have the Cell Phone, What Then?

- Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622 (E.D.Pa. 2006).
- Student's cell phone went off in class, school seized the phone.
- Did not stop there, stood in hall and called recently dialed numbers to see if those students also had phones at school.
- While they had the phone, the teachers claimed that they "received a text message from [the student's] girlfriend that he get her a 't***in' tampon'. The term 'tampon', Ms. Grube later averred, is a reference to a large marijuana cigarette."
- Then they accessed the student's text messages and his voice mail messages on the phone.
- They then used the IM function to converse with the student's brother without identifying themselves.



Klump Cont'd.

- Student filed a 10 count complaint.
- PA state law wiretapping claims dismissed.
- Invasion of privacy/slander/defamation claims related to drug dealer statements dismissed.
- 4th Amendment claims survived. Okay to seize the phone, but no basis to search it as there was no reasonable suspicion under T.L.O. at the inception of the search. The drug text was not discovered until midway through the search.
- Negligence claim against for individual teachers and the school remained for trial.



"New Booty" Video.

- Requa v. Kent School Dist. No. 415, 492 F.Supp.2d 1272 (W.D.Wash. 2007)
- Student used his cell phone to tape a female teacher in class. The video "features footage of a student standing up behind the teacher making faces, putting two fingers up at the back of her head and making pelvic thrusts in her general direction. Additionally, in a section preceded by a graphic announcing 'Caution Booty Ahead,' there are several shots of Ms. M's buttocks as she walks away from the videographer and as she bends over; the music accompanying this segment is a song entitled 'Ms. New Booty.'"



"Ms. New Booty".



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"New Booty" Video.

- Three key facts were not in dispute:
 1. There was no dispute that the video had been made on school grounds;
 2. There was no dispute that the video taken at school was then edited and mixed with the sound off of school grounds; and,
 3. There was no dispute that Requa used his home computer to post the video on YouTube.
- Requa was identified from the video and was advised that he was being suspended for forty (40) days for violations of various School anti-harassment and conduct policies.
- Requa challenged the suspension contending that the school violated his 1st Amendment and due process rights.

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"New Booty" Video.

- With respect to the 1st Amendment, Requa argued that his video was constitutionally protected "criticism of Ms. M ... and upon the teacher's hygiene."
- The court was not persuaded by this argument, particularly in light of the sexual nature of the video. The Court noted that the pelvic thrusts and the booty video "cannot be denominated as anything other than lewd and offensive and devoid of political or critical content."
- The Court followed *Fraser* and upheld the School's ability to limit "vulgar and lewd speech such as [this which] would undermine the school's basic educational function."

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Sexting.



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Sexting cont'd.

- CBS January 15, 2009 Headline: "Sexting" Shockingly Common Among Teens. - Latest Case Involves Three Teen Girls In Pa. Who Sent Nude Pics To Three Boys.
- "Roughly 20 percent of teens admit to participating in 'sexting,' according to a nationwide survey by the National Campaign to Support Teen and Unplanned Pregnancy. 'This is a serious felony. They could be facing many years in prison,' CBS News legal analyst Lisa Bloom said of the six teens in Pennsylvania. But, Bloom added, 'What are we going to do, lock up 20 percent of America's teens?'"

CBS
Bloom

Miller v. Skumanick.

- School seized several student phones and found "photographs of scantily clad, semi-nude and nude teenage girls."
- School turned phones over to prosecutor who stated that students who possessed the pictures could be prosecuted for child pornography.
- Prosecutor sent a letter to 20 students, both those who had the pictures and the girls who posed/took them, noting that no charges would be filed if they enrolled in a special class and underwent counseling.

CBS
Bloom

Miller cont'd.

- Refusing the "plea agreement", the girls brought suit against the prosecutor to enjoin the prosecution and proposed plea agreement raising 1st and 14th Amendment concerns.
- Parents argued that the plea agreement violated their 14th Amendment substantive due process right "to be free from state interference with family relations."
- Next they argued that the plea agreement program constituted "compelled speech" in violation of the 1st Amendment since they had to write an essay describing "what they did wrong and how it affected the victim." The girls argued they were victims.



Miller cont'd.

- The girls also argued that the prosecution and plea agreement were retaliation against them for refusing to engage in the compelled speech, violating the 1st Amendment.
- District Court found in favor of the students and that the plea agreement potentially violated both the 1st and 14th Amendments.
- The Court also found that the prosecution probably could not go forward anyway under Pennsylvania law since "the images presented to the court do not appear to qualify in any way as depictions of prohibited sexual acts."
- The girls also did not disseminate the pictures.



Handling Sexting Pictures.

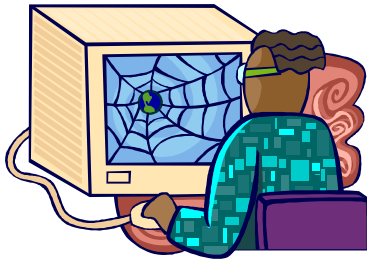
- "High school assistant principal in Loudoun County arrested for child pornography." August 20, 2008.
- Ting-Yi Oei found a picture of an unknown topless student on another student's cell phone.
- He downloaded the image to his phone and began an investigation into who the girl was and the circumstances of the picture.



Ting-Yi Oei.

- Mr. Oei was unsuccessful in finding out who the girl was.
- However, a parent of a student he interviewed complained to the police.
- Mr. Oei was arrested and prosecuted for "failure to report child abuse."
- School suspended him, and although the charges were eventually dismissed, his reputation was destroyed and he was bankrupted by legal fees.

The Dangers of Cyber-Communication in School.




Layshock v. Hermitage Schools

- Layshock created a parody of the high school principal on Myspace. No school resources were used but a photo from the school website was copied. The principal was described as an alcoholic who used marijuana. Layshock told a few friends but eventually nearly the entire student body heard about it.

MySpace Parody

A Myspace for Your Principal
Web site: http://www.myspace.com/markanaga



In my Junior year of high school, things were getting a little boring. The Seniors were too busy to pull any pranks (in fear that they might not walk due to Senior Agreements, a piece of paper they sign in the beginning of the year to ensure they behave).

So, without telling anyone, I created a Myspace for my Vice Principal, Mark Anaga.

I deliberately selected the VP for this prank, as he is the most haterfearful man on campus. Literally the personality of a kitchen appliance, he's infamous for going to the back, everything is black and white, no exceptions.

Myspace is the most popular website for high school students in Hawaii, more than 75% of students at my school have one, so I knew this would be big.

I scanned his picture from the yearbook and photoshopped it into my classmates Myspace pictures. I then started adding random classmates as friends.

I changed Anaga's personality to that of a 45 year old gay man who lives with his mother and just wants to be accepted by the students. This proved to be a small move and made the profile even more popular.

Here is the Myspace:

<http://www.myspace.com/markanaga>

Layshock

- "The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited. Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system."

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Layshock

"The actual disruption was rather minimal -- no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action. A primary piece of evidence on which Defendants rely is that one computer teacher threatened to shut down the system, but that teacher testified that he was able to restore order to his classroom and that the incident was triggered by a profile other than Justin's. The profiles were accessible for less than one week before being disabled immediately prior to the Christmas vacation. There were some student comments about the profiles. However, in Tinker the Supreme Court held that the far more boisterous and hostile environment sparked by the children wearing anti-Vietnam war armbands, did not give school officials a reasonable fear of disturbance sufficient to overcome their right to freedom of expression."

**Justice
Brown**

Blurring the Boundaries.

What happens when the lines between teachers and students become blurred on social networking sites?

- Studies show that 10% of female students "report being sexually harassed or abused by a school employee."
- There are two types of child molesters, the "grabbers" and the "groomers."
- Social networking sites allow an unmonitored opportunity for the blurring of the boundaries between teacher and students giving the "groomers" unfettered access to students outside of the school environment.
- "The process of sexual grooming involves finding a suitably vulnerable student and engaging in increasingly invasive boundary invasions behaviors with that student. The boundary invasions reveal which students may be taken advantage of."

Based on "Protecting Children from Sexual Misconduct by School Employees", May, 2008 Issue of Inquiry & Analysis.



Blurring, cont'd.

Sexual grooming is defined as a five step process:

1. **Identifying a vulnerable child** – At risk children show low self-esteem, lack self-confidence, in trouble at school;
2. **Engaging the child in peer-like involvement** - Social networking sites provide the perfect opportunity for these interactions;
3. **Desensitizing the child to the conduct** – To do this, known molesters inevitably blur the boundaries between appropriate and inappropriate contact. They attempt to normalize inappropriate contacts;
4. **Isolating the child** – Social networking sites are perfect for this by allowing the individual to monopolize the child's time and to encourage the child to keep secrets;
5. **Making the child feel responsible** – The initial contact is used to arouse the child's curiosity interest in sexuality, and then the child is made to feel responsible for the interest in sex.

Based on "Protecting Children from Sexual Misconduct by School Employees", May, 2008 Issue of Inquiry & Analysis.



Blurring, cont'd.

- On Facebook users can add friends and send them messages, and update their personal profiles to notify friends about themselves. Additionally, users can join networks organized by city, workplace, **school**, and region.
- The Facebook friends process provides the perfect opportunity for grooming behavior by potential molesters, and especially those who may be school employees.
- The process begins with a friend request, which may be completely innocent, and can be linked to legitimate school purposes like homework help.
- Once the school employee and the student become friends, the privacy capabilities of Facebook permit the remaining three steps of grooming behavior, desensitization, isolation, and responsibility, to take place in private.



Predators at Home and on the Internet.



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Hindson

Brian D. Hindson.

- In March of 2006, an individual in North Carolina reported to the FBI that she found two videos showing what appeared to be a high school female in a locker room changing out of a bathing suit on a computer that had been sold to her on eBay.
- An investigation revealed that the seller was Brian Hindson a long-time swim coach in central Indiana.
- A review of his computer equipment revealed that Mr. Hindson had been secretly taping girls at pools throughout central Indiana for more than ten years.
- According to press reports, "Mr. Hindson admitted to the FBI that he hid video cameras in locker rooms at Kokomo High School and Westfield High School -- where the swim club operated."

Post
Brown
Hindson

Hindson cont'd.

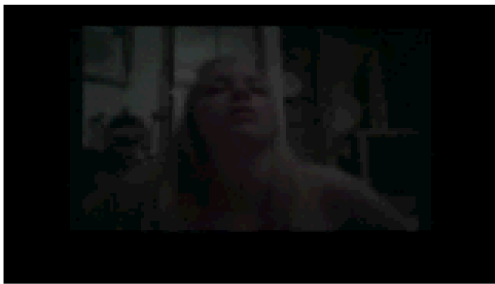
- Perhaps more disturbing than the covert photography was Mr. Hindson's use of Internet chat rooms and texting to meet and exchange photographs and videos with young girls.
- According to testimony at his sentencing hearing Mr. Hindson would enter chat rooms posing as a male teenage swimmer.
- He would begin chatting with young females and eventually would go off-line and exchange e-mails and text messages with them.
- These cyber-relationships would progress into sexual matters and Mr. Hindson would exchange nude or semi-nude photos with them.
- At least one young girl eventually sent him several explicit sexual videos which he later posted on the Internet.

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Brown
Hindson

Hindson cont'd.

- On October 18, 2008, Mr. Hindson was sentenced to 400 months (33 years) in prison on eleven counts of production of child pornography, four counts of distribution of child pornography and one count of possession of child pornography.
- He was also ordered to pay a \$5,000 fine and to serve a lifetime period of supervised release upon completion of his sentence.
- Mr. Hindson is currently incarcerated at the Federal Correctional Institution ("FCI") in Marianna, Florida.





Pamela Rogers

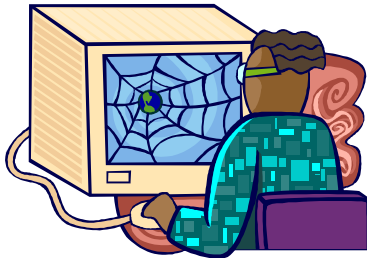


TO NUMBER 10... "My Plans are your Plans... Nothing's Changed..." "Say it... say it..." Always in the words, Baby, always, Listen to "Get Away" by Nickleback... that's for you but you know... I hate hearing something that is already the opposite of what you have said. I hate less honest is the biggest, most important part in people. When I find out that I have been lied to and deceived after all the sacrifices I have made, it makes me want to...

- Former Gym Teacher who was found guilty of having sex with a 13-year-old boy and served 6 months;
- Was rearrested after she allegedly sent sexy videos and pictures to the boy as well as contacting him indirectly through her MySpace website;
- Sentenced to two more years for 4 new felony charges for sending pictures through a cell phone in addition to having to serve her entire original 7 year sentence.



When Young Teachers Go Wild on the Web



Post
Download
Source

So is this a problem for Schools?

- 2008 Washington Post Article entitled "When Young Teachers Go Wild on the Web."
- "One Montgomery County special education teacher displayed a poster [on Facebook] that depicts talking sperm and invokes a slang term for oral sex."
- "One woman who identified herself as a Prince William County kindergarten teacher posted a satiric shampoo commercial with a half-naked man having an orgasm in the shower."
- "A D.C. public schools educator offered this tip on her page: 'Teaching in DCPS -- Lesson #1: Don't smoke crack while pregnant.'"

Post
Download
Source

Question Presented.

- "[T]he crudeness of some Facebook or MySpace teacher profiles, which are far, far away from sanitized Web sites ending in '.edu,' prompts questions emblematic of our times: Do the risqué pages matter if teacher performance is not hindered and if students, parents and school officials don't see them? At what point are these young teachers judged by the standards for public officials?"

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Intersection of Facebook & the Classroom.

- "Erin Jane Webster, 22, a long-term substitute teacher in Prince William, keeps a page similar to other teachers'. Portions are professional, but some parts suggest the author is in the throes of sorority rush."
- Ms. Webster's page also featured multiple "bumper stickers," including one that uses a crude acronym for attractive mothers ("MILF") and another that said: "you're a retard, but i love you."
- The problem: "Webster teaches students with emotional and learning disabilities."



Intersection cont'd.

- According to the article: "Click 'View Photos of Erin,' and you can see her lying on her back, eyes closed, with a bottle of Jose Cuervo tequila between her head and shoulder. Or click on her 'summertime' photo album and see a close-up of two young men flashing serious-looking middle fingers."
- Alina Espinosa, an Elementary teacher wrote on her Facebook page in the "About Me" section: "I only have two feelings: hunger and lust. Also, I slept with a hooker. Be jealous. I like to go onto Jdate [an online dating service for Jewish people] and get straight guys to agree to sleep with me."



"Retard" posting as a basis for liability.

- Schroeder v. San Diego Unified Sch. Dist., 2009 U.S. Dist. LEXIS 40422 (S.D.Cal. 2009)
- Tutor in a special education classroom had MySpace page with derogatory comments about special education students. School disciplined tutor for the comments but tutor remained in classroom.
- Tutor later sexually molested a student in the special education classroom.
- Summary judgment denied for individual School supervisors, in part based on School's knowledge of tutor's attitude towards special education students as shown on MySpace page.



MySpace Comments Admissible.

- Ian J. Clark v. State of Indiana, No. 43S00-0810-CR-575 (Ind. October 15, 2009).
- Defendant killed his two year old daughter while drunk.
- "One of his trial objections does pose a novel question: should the trial court have permitted the State to offer into evidence Clark's entry from the social networking website MySpace? We hold that this electronic evidence was admissible, and we affirm Clark's conviction and sentence."
- Clark put his character at evidence.
- Defendant tried to keep it out under Rule 404, Indiana Supreme Court held: "Thus, the State is right to observe that this is solely evidence of his own statements, not of prior criminal acts. It was Clark's words and not his deeds that were at issue, so Rule 404(b) does not apply."



Teachers and Explicit Photos



- Tamara Hoover suspended for allegedly explicit photos that had been posted on Flickr.
- The photos, taken by her partner, depicted Hoover topless in the shower, lifting weights, getting dressed, in bed and doing other routine activities, allegedly as art.
- The photos came to light as a result of a feud with another teacher. Students who had seen the pictures showed the teacher in class, who then notified school officials.



Blogging from and about School.

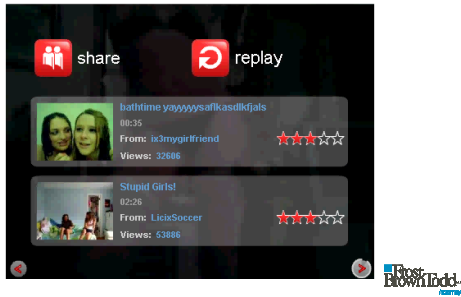
What happens when teachers blog from and about school?

- Technocrati.com, a blog tracking website, listed 850 blogs by teachers in 2006, many receiving thousands of hits a week.
- What can/should a school do about teachers' blogs? Depends on what is said and how it is said.
- What about engaging colleagues, administrators and students in a discussion of educational strategies?
- Criticism of administrative decisions?
- Discussion of student issues?
- Discussion of union related issues?
- Whistleblowing?

Based on "Employee Use, Misuse, and Abuse of Social Networking Sites", January, 2008 Issue of Inquiry & Analysis.



U-Tube.



Administrative Concerns

- Harassment of co-workers;
- Misconduct with students;
- Role model;
- Disclosure of confidential information;
- Comments that are inconsistent with their job as a teacher;
- On the job use of the internet, ghost employment issues;
- Violent remarks or threats.



So what can you do?

- Whistleblower statutes;
- Discrimination and harassment statutes;
- Defamation;
- State privacy statutes;
- Wrongful termination;
- Key differentiation between Schools and private employers is the 1st Amendment.



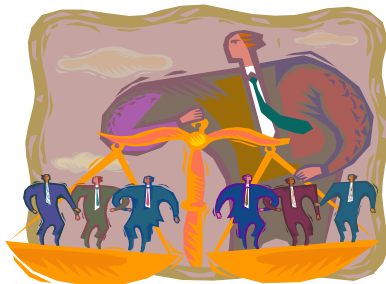
“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Modes of Speech.

- There are four ways in which a school employee speaks.
- [1] The first is where a public employee speaks off the job as a private citizen on government policies that are of interest to the public at large, such as when a teacher writes a letter to the editor expressing a political point as in Pickering v. Board of Education.
- [2] The second is where the public employee engages in speech while at work but not as part of his employment, such as a district attorney passing out a questionnaire about job conditions at work as in Connick v. Myers.
- [3] The third is where the public employee engages in speech off the job as a private citizen that is not related to government policies as in Roe v. City of San Diego.
- [4] The fourth and final way is where a public employee speaks on the job as part of his or her official duties on government policies that are of interest to the public at large as in Ceballos v. Garcetti.



Pickering Balancing Test



Two Part Pickering Analysis.

- Is the speech on a matter of public concern and therefore protected?
- If the speech is not on a matter of public concern and is therefore not protected, the inquiry stops.
- If the employee's speech is protected under the 1st Amendment then a court will balance the employee's right to speak vs. the employer's interest in having its business done in the workplace. This is known as the Pickering balancing test.



Public Concern Prong.

Connick v. Myers, 461 U.S. 138 (1983).

"We hold only that when a public employee speaks not as a **citizen** upon matters of public concern, but instead as an **employee** upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."



7-Factor Pickering Balancing.

1. Whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers;
2. Whether the employment relationship is one in which personal loyalty and confidence are necessary;
3. Whether the speech impeded the employee's ability to perform her daily responsibilities;
4. The time, place, and manner of the speech;



7-Factors Cont'd.

5. The context in which the underlying dispute arose;
6. Whether the matter was one on which debate was vital to informed decision-making; and,
7. Whether the speaker should be regarded as a member of the general public.

Vargas-Harrison v. Racine Unified Sch. Dist., 272 F.3d 964, 971 n. 2 (7th Cir. 2001)



Ceballos v. Garcetti.

- Ceballos was a deputy district attorney.
- Allegedly disciplined for arguing in court pleadings, over his supervisors' instructions, that the LA County Sheriff's Department was falsifying probable cause affidavits.
- He received "freeway therapy."
- Sued alleging retaliation for 1st Amendment speech.
- LA defended arguing that the speech was not protected since he was speaking as a "public employee" and "not as a citizen upon matters of public concern."
- 9th Circuit rejected this argument and said that public employee speech is always protected.



Ceballos Cont'd.

- "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline."



Naked Cops.

- *City of San Diego v. Roe*, 543 U.S. 77 (2004) - police officer created a pornographic website that offered sexual videotapes of him in his uniform.
- When disciplined he challenged that discipline arguing that the City's actions violated his 1st Amendment rights.
- The 9th Circuit agreed determining that such speech was on a matter of public concern and thus subject to *Connick/Pickering* balancing.
- The Supreme Court disagreed: "In concluding that Roe's activities qualified as a matter of public concern, the Court of Appeals relied heavily the Court's decision in *NTEU* 356 F.3d, at 1117. ... The Court of Appeals' reliance on *NTEU* was seriously misplaced."



Naked Cops cont'd.

- The Supreme Court determined, contrary to the 9th Circuit, that the police officer's videotapes were not on a matter of public concern finding that "Pickering did not hold that any statements by a public employee are entitled to balancing. To require Pickering balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices."
- Thus with internet speech just as with other public speech there is always a threshold inquiry regarding whether the speech is protected.



Mr. Spiderman.

- Jeffrey Spanierman was an English teacher who had a MySpace site "to communicate with students about homework, to learn more about the students so he could relate to them better and to conduct casual, non-school related discussions."
- One of his profile pages was titled "Mr. Spiderman" and had pictures of him from ten years earlier, pictures of students, and nude pictures of other men.
- A counselor saw the site and he was instructed it was inappropriate and he took it down.
- He created a new page "Appollo68" a few days later which was nearly identical to the prior page.



Mr. Spiderman cont'd.

- Mr. Spanierman was fired for his conduct and sued various administrators asserting they violated his 1st Amendment rights to freedom of speech and freedom of association.
- Spanierman v. Hughes, 576 F.Supp.2d 292 (D.Conn. 2008).
- **Issue I:** Was the MySpace account part of his "official duties?" If so, Garcetti would knock out the claims. Court said no, "[t]here is no indication in the record that the Plaintiff, as a teacher, was under any obligation to make the statements he made on MySpace."



Mr. Spiderman cont'd.

- **Issue II:** Was the MySpace speech on a matter of "public concern?"
- "The court ... concludes that almost none of the contents of the Plaintiff's profile page touched matters of public concern. The majority of the profile page consisted of personal conversations between the Plaintiff and other MySpace users or creative writing."
- However, one poem expressing opposition to the Iraq war was found to be protected, but no evidence it motivated the discharge.



Mr. Spiderman cont'd.

- **Issue III:** Was the speech disruptive to the school?
- Based on a number of "peer to peer" style exchanges with students including sexual discussions, the Court concluded: "[I]t was not unreasonable for the [school] to conclude that the Plaintiff's conduct on MySpace was disruptive to school activities. The above examples of exchanges the Plaintiff had with students show a potentially unprofessional rapport with students."



Mr. Spiderman cont'd.

- **Issue IV:** Freedom of Association.
- Court recognized that there is a Constitutional right to associate with an organization for the purposes of speaking out on matters of public concern.
- "MySpace invites its users to '[c]reate a **private** community ... and ... share photos, journals and interests with your growing network of mutual friends!'"
- Because it is a "private" community, there could be no public expression.



What Schools Can Do.

- Revise handbook and board policies (e.g. harassment, workplace violence, confidentiality) to address employee blogging and use of social networking websites;
- Adopt a consistent approach to employee discipline for policy violations;
- Advise teachers that they have no expectation of privacy when using a school computer system;
- Prohibit disclosure of confidential information.



Drafting a Policy.

- Prohibit the disclosure of personal information of supervisors/co-workers;
- Prohibit violations of school/board policy – harassment, workplace violence, code of ethics, etc.;
- Prohibit conduct disruptive of the school environment;
- Prohibit use of the school's name, logos, web material;
- Prohibit any suggestion that the teacher represents the school in on-line activities;
- Express warning regarding disciplinary action for boundary invasions with students.



Nonlegal Methods of Dealing With Inappropriate Internet Speech.

- With respect to social networking sites get the MySpace.Com Administrators' Guide, available from AASA.
- Google which operates Blogger.com and blogspot.com provides terms and conditions for users at <http://www.blogger.com/terms.g> and <http://www.google.com/accounts/TOS>. These conditions purport to ban speech that involves "Illegal Purposes, Spam, Identity Theft and Privacy, Hate Content, or Defamation/Libel."
- However, these protections are largely toothless. Google states that "if we have reason to believe that a particular statement is defamatory (a court order, for example), we will remove that statement." Hate content will generally not be removed, but will just be "flagged."



References and Sources.

- "It's a New CyberWorld Out There: Tips to Avoid Personnel Pitfalls." The School Administrator, October, 2007;
- "Protecting Children from Sexual Misconduct by School Employees", May, 2008 Issue of Inquiry & Analysis;
- "Employee Use, Misuse, and Abuse of Social Networking Sites", January, 2008 Issue of Inquiry & Analysis.



References cont'd.

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Thank You.

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